COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2015-SC-000107-DG

INDIANA INSURANCE COMPANY — APPELLANT

v. On Discretionary Review for the Kentucky Court of Appeals
Case No. 2013-CA-000338-MR

JAMES DEMETRE — APPELLEE

BRIEF ON BEHALF OF *AMICUS CURIAE*, KENTUCKY JUSTICE ASSOCIATION

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 7th day of January 2016, ten (10) originals of the Brief on Behalf of *Amicus Curiae* were served via Federal Express to Susan Stokley Clary, Clerk of the Supreme Court, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601; with one (1) copy served by U.S. First Class Mail to the following: Samuel Given, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Donald L. Miller, II, Kristin M. Lomond, Quintairos, Prieto, Wood & Boyer, P.A., 9300 Shelbyville Road, Suite 400, Louisville, Kentucky 40222; Michael D. Risley, Bethany A. Breetz, Stites & Harbison, PLLC, 400 West Mark Street, Suite 1800, Louisville, Kentucky 40202; Jeffrey M. Sanders, Jeffrey M. Sanders, PLLC, 437 Highlands Avenue, Fort Thomas, Kentucky 41075; Robert E. Sanders, Justin E. Sanders, The Sanders Law Firm, 1017 Russell Street, Covington, Kentucky 41011; Kevin C. Burke, 125 South Seventh Street, Louisville, Kentucky 40202; and Hon. Fred A. Stine IV, Judge, Campbell Circuit Court, 330 York Street, Newport, Kentucky 41071.

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STATEMENT OF POINTS AND AUTHORITIES

I: INTRODUCTION

Should the heightened proof requirements in *Osborne v. Keeney* S.W.3d 1, 16 (Ky. 2012) extend to bad faith claims under the Unfair Claims Settlement Practices Act?

In its well-reasoned Opinion, the Kentucky Court of Appeals correctly determined the heightened proof requirements set forth by this Court in *Osborne v. Keeney* should not extend to bad faith claims under the Unfair Claims Settlement Practices Act. In reaching this decision, the Court correctly noted claims of emotional distress in bad faith actions are unique and different from negligent and intentional infliction tort cases (IIED and NIED). Further, it upheld the longstanding tradition of allowing emotional distress damages in non-NIED cases without requiring an expert and aligned Kentucky with 44 other states which have addressed this and similar issues. For these reasons, the Kentucky Court of Appeals Opinion should be affirmed by this Court.

II: PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association (formerly Kentucky Academy of Trial Attorneys) is a non-profit organization of over 1400 members dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury.

Amicus Curiae submits that extending the heightened requirements for NIED claims to all other types of claims, including claims brought under the Unfair Claims Settlement Practices Act, would be in conflict with existing Kentucky statutes and case law and would make Kentucky virtually an island unto its own on this issue.

III: STATEMENT OF THE CASE

In 2006, Appellee James Demetre contracted with Appellant Indiana Insurance Company (IIC) for his home, automobile, and excess umbrella insurance.[1] Together, the bundled policies provided $2.5 million in liability coverage.[2] In April 2008, at the urging of

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his insurance agent, Mr. Demetre added liability coverage for two other parcels of land he and his wife owned in Kenton and Campbell Counties.[3] When Mr. Demetre applied for insurance, he told the agent the Campbell County property was a vacant lot that had been used as a gasoline station by a prior owner decades before.[4] The agent transmitted the application and all information to IIC's underwriting department. IIC authorized coverage. Demetre paid the premiums and IIC amended the policy to cover the two additional lots. IIC *renewed* the annual policies three times—twice while this case was in litigation.[5]

In 2004, Mahannare Harris, her six children and adult partner, moved into the house next door to Mr. Demetre's Campbell County lot. Mr. Demetre first learned about the family in September 2008 when the Harris family's lawyer sent Mr. Demetre a letter.[6] The letter alleged members of the Harris family suffered injuries from gasoline fumes migrating from Mr. Demetre's property into the Harris home ("the Harris claims"). The letter claimed the Harris family incurred "significant medical damages" and a loss in fair market value of their home. On September 11, 2008, Mr. Demetre timely notified IIC of the Harris' claims.[7] IIC responded by engaging in a years' long course of action to designed to wrongfully deny Mr. Demetre the contractual benefits he bought and paid for under his insurance policy.

For the first 379 days after the Harris claims were made, IIC conducted *no investigation* of the Harris claims despite having several adjusters on the file.[8] Without a response or action from Demetre's carrier, counsel for the Harris family filed suit against Mr. Demetre on August 14, 2009. The Harris family also sued IIC Insurance for third-party bad faith. IIC's mishandling of the claim and Mr. Demetre's defense continued unabated.

On January 25, 2010, IIC filed its first declaratory judgment action against Demetre asserting "on-going loss" and "known loss" theories.[9] This was done despite IIC's subjective

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[3] VR: 9/26/12; 03:24:30.
[4] VR: 9/26/12; 03:24:58.
[5] VR: 9/24/12: 12:24:55.
[6] VR: 9/26/12; 03:30:29.
[7] VR: 9/26/12; 03:31:02.
[8] VR: 9/21/12; 11:54:09; R. 1693 at p. 8.
[9] R. 48-56.

knowledge, based upon an expert report obtained by Mr. Demetre's attorney from expert Bill Johnston, stating that there was no "loss" occurring on either the Demetre property or the Harris property. Because the known loss and on-going loss theories turned on contested issues of fact, the trial court denied IIC's summary judgment motion on December 8, 2010.[10] After losing the motion, on February 10, 2011, IIC dropped these defense theories.[11]

Undaunted, IIC asserted a new defense theory—"time-of-loss"—to apportion the lion's share of any Harris plaintiffs' damages to a time period outside of the policy's effective date. To carry out that plan, on June 29, 2011, IIC filed a second cross-claim against Demetre.[12] On November 7, 2011, IIC filed yet another cross-claim.[13] When questioned at trial, ***IIC's adjuster admitted he confabulated IIC's new theory and there was no factual basis for a "time-on-loss" defense***:

> Q. But there was no evidence to support that, other than your speculation and conjecture, correct?
> A. Correct.[14]

Even though the evidence proved the Harris case was vulnerable to summary judgment, or at best, a nuisance value case, IIC "settled" the Harris case by giving the plaintiffs $165,000.00. By paying a large sum to people with no damages, IIC thought it could argue it "never denied [Demetre] coverage, had defended [Demetre] at all times, and had indemnified [Demetre]."[15] On February 17, 2012, on Demetre's motion, the Circuit Court dismissed IIC's third amended complaint, ending IIC's bogus "time on loss" defense.[16]

In total, IIC fought Mr. Demetre for more than three years from the date it received notice of the Harris claims until the date when IIC finally resolved them. His quest for

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[10] R. 264-271.
[11] R. 321-331; *see also* Order of May 16, 2011, R. 354-356.
[12] R. 420-427.
[13] R. 635-643..
[14] VR: 9/24/12; 03:45:24
[15] IIC's Appellant's Brief to Court of Appeals at p. 2.
[16] R. 889.

justice cost Mr. Demetre three years of his life and $397,541.04[17] of his retirement savings to fight the deceptive business practices and bad faith misconduct of IIC.

At trial, Mr. Demetre testified at length about the emotional, psychological, and financial damages he suffered because of IIC's intentional and wrongful misconduct. At age 72, Mr. Demetre lost a large part of his life savings fighting IIC's made-up "defenses" for which IIC's adjusters knew there was never any evidence. Mr. Demetre agonized with worry about the stress and costs of fighting a huge insurance company and the financial harm a large liability judgment could cause him and his family if the Harris claims were successful.[18] IIC's mean-spirited assault on Mr. Demetre's integrity and the dogged determination of IIC's claims handlers to invent coverage issues where none existed multiplied Mr. Demetre's emotional and psychological distress.

The jury correctly held IIC accountable for its deceitful and malicious misconduct under each of three (3) causes of action, by awarding $925,000 in compensatory damages, including emotional distress damages, and $2,500,000 in punitive damages—a decision upheld by both the Campbell Circuit Court and the Kentucky Court of Appeals.

IV: ARGUMENT

A. Osborne's Heightened Proof Standard for Emotional Distress Damages is Limited to NIED Claims and Should Not Be Applied in Bad Faith Actions

This Court's holding in *Osborne* cites, and specifically adopts, the Tennessee version of NIED established in *Camper v. Minor* 915 S.W.2d 437 (Tenn. 1996). *Camper* established the need for expert proof in NIED cases. *Id* at 446. Five years after *Camper*, the Tennessee Supreme Court addressed the issue of whether *Camper*'s expert-proof requirement applies to other types of claims. In following the majority of courts addressing the issue, the Tennessee Supreme Court stated and held in *Amos v. Vanderbilt University*, 62 S.W.3d 133 (Tenn. 2001) that it does not. The Court stated:

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[17] R: DD at 9-12.
[18] VR: 9/26/12; 04:05:25.

We granted appeal in this case to determine whether the special proof requirements of *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996), extend to all negligence claims in which damages for emotional distress are sought as an item of compensatory damages. **We hold that the special proof requirements of *Camper* apply only to 'stand-alone' claims of negligent infliction of emotional distress.**"

Id. at 134-35 (emphasis added).

The Tennessee Supreme Court went on to state:

In *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996), this Court addressed the proper analysis of claims for negligent infliction of emotional distress without an accompanying physical injury. The plaintiff, Camper, was involved in an automobile accident in which a sixteen-year-old driver, Taylor, was killed when she pulled out in front of Camper's cement truck. Camper filed suit against the administrator of Taylor's estate seeking damages for emotional injuries sustained as a result of viewing Taylor's body immediately following the accident. Camper testified in his deposition that he suffered no physical injuries, other than a small scrape on his knee for which he received no medical treatment.

This Court examined the law of negligent infliction of emotional distress in Tennessee and in other jurisdictions. We abandoned the traditional "physical manifestation" rule previously applied in Tennessee. Instead, we concluded that cases of negligent infliction of emotional distress should be analyzed under the 'general negligence' approach. In order to make out a prima facie case of negligent infliction of emotional distress, the plaintiff must prove the elements of duty, breach of duty, injury or loss, causation in fact, and proximate cause. The Court further held that recovery for negligent infliction of emotional distress is limited to serious or severe emotional injury supported by expert medical or scientific proof. Id.

Vanderbilt contends that Camper's requirements of expert medical or scientific proof and serious or severe injury extend to all negligence claims resulting in emotional injury. We disagree. The special proof requirements in *Camper* are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims.

Id. at 136-137 (emphasis added)(internal citations omitted);

The Tennessee Supreme Court ultimately held:

We hold that the **special proof requirements** outlined in *Camper v. Minor,* 915 S.W.2d 437, 446 (Tenn.1996), **apply only to "stand-alone" claims for negligent infliction of emotional distress**. Plaintiffs, like the Amoses, who seek damages for emotional injuries as one of multiple claims for damages,

> therefore, are not required to meet the special proof requirements under *Camper*.

Id. at 139.

Much of this Court's decision in *Osborne* rests on its alignment with the decision of the Tennessee Court in Camper.[19] However, the Tennessee Court clarified its position in *Amos*. The Court of Appeals clarification of this Court's holding in *Osborne* is in agreement with the Tennessee Supreme Court's stance in *Amos*; the heightened expert-proof requirement is only imposed on NIED claims.

A deeper analysis offers further support for the position the *Osborne* (and *Camper*) cases were not meant to heighten the requirements in other negligence and statutory tort cases. *Osborne* and *Camper* adopted the IIED requirement for proof of "severe emotional distress" expressed in Restatement Second of Torts sec. 46. Importantly, after recognizing IIED, this Court refused to apply the IIED heightened proof standard when evaluating other statutory violation emotional distress claims. In *Childers Oil Co. v. Adkins*, 256 S.W.3d 19 (Ky. 2008), this Court held:

> Childers's alternative argument is likewise grounded on a misapplied principle. In its brief, Childers bases its alternative argument on case precedent and analysis of the elements of the tort action of intentional infliction of emotional distress (IIED). Based on this analysis, Childers claims that the jury award is excessive because Adkins has not shown that her embarrassment rose to the level of severe emotional distress required by the tort law. **Childers may be right that the evidence does not bear out a claim for intentional infliction of emotional distress, but analyzing this jury verdict under that tort law is entirely incorrect. Adkins did not bring an action for IIED; rather she requested an instruction for compensatory damages under the Kentucky Civil Rights Act, which would include emotional distress.**

Id. at 27 (emphasis added).

Childers makes clear the proof necessary to seek emotional distress damages emanating from statutory violations or other civil actions did not change after Kentucky

[19] *See Osborne*, 399 S.W. 3d 1, at footnotes 43, 58, 61, 62, 63, 74, 75, and 76.

recognized a cause of action for IIED. And there is nothing to suggest recognition of NIED claims should do so either.

The United States District Court for the Western District of Kentucky has also addressed this issue. In *Minter v. Libert Mut. Fire Ins. Co.*, 2014 WL 4914739 (W.D. Ky. Sept. 30, 2014), Minter filed a Kentucky's Unfair Claim Settlement Practices Act and the common law tort of bad faith against Liberty Mutual alleging it had breached its duty to settle her UIM claim. *Id.* at 2. In her Amended Complaint, Minter sought several different types of damages, including compensation for mental anguish and anxiety. *Id.* In its argument that summary judgement should have been granted on the emotional distress damages claims, Liberty argued that, under *Osborne*, there was a heightened proof requirement for emotional distress damages in bad faith claims. Judge Simpson, in *Minter*, did not agree. In a footnote, he specifically addressed this argument and held:

> Liberty Mutual ***incorrectly*** asserts that, in order to recover emotional distress damages, Minter must meet the strict standard of proof that is required for a Negligent or Intentional Infliction of Emotional Distress claim ("NIED" and "IIED").DN 81–13 (citing *Osborne v. Keeney,* 399 S.W.3d1 (Ky.2012) (discussing the proof required to prevail on a NIED claim); *Powell v. Tosh,* 2013 WL 1878934 (W.D.Ky. May 3, 2013) (discussing NIED under Kentucky law); *Farmer v. Dixon Electrical Systems and Contracting, Inc.,* 2013 WL 2405547, at * 9 (E.D.Ky. May 31, 2013) (discussing IIED under Kentucky law). The high standard makes sense in those cases, as the elements of such a claim specifically require "severe or serious emotional injury." *Osborne,* 399 S.W.3d at 17. **Here, bad-faith conduct in settling a claim is alleged to have caused the Plaintiff emotional harm. This is not a claim sounding in negligence, NIED, or IIED. Liberty Mutual cites no authority applying *Osborne* in the context of bad faith. Nor could it, because plaintiffs claiming statutory violations have recovered for humiliation, embarrassment, or nervous shock, and the courts allowing those recoveries did not require evidence of serious or severe emotional injury.** *See, e.g., Kentucky Comm'n on Human Rights v. Fraser,* 625 S.W.2d 852, 856 (Ky.1981) (allowing the plaintiff to recover for mere embarrassment and humiliation caused by a violation of the Kentucky Civil Rights Act, Ky.Rev.Stat. Ann. § 344.200, et seq); *Louisville & N.R. Co. v. Ritchel,* 147 S.W. 411, 414 (Ky.1912) (allowing the plaintiff to recover nominal damages for her humiliation and nervousness caused by a conductor's violation of his statutory duty to assign passengers to the proper coach); *Mountain Clay, Inc. v. Com., Comm'n on Human Rights,* 830 S.W.2d 395, 397 (Ky.Ct.App.1992)

(allowing the plaintiff to recover for embarrassment caused by her employer's violation of the Kentucky Civil Rights Act, Ky.Rev.Stat. Ann. § 344.200, et seq).

Id. at 5.

Judge Simpson notes that nowhere in *Osborne* does this Court state the ruling applies to bad faith claims—such as those addressed in *Minter* and in this case—and for good reason. If it did, it would be a departure from long standing Kentucky case law, and a departure from the caselaw of other states, such as Tennessee, upon which *Osborne* is partially based. Applying the NIED heightened proof standard to bad faith cases, or other statutory violation cases, has never been the law in Kentucky and, as the Court of Appeals has held, should not be the law now. To do so is in direct opposition to existing case law and would, as discussed below, make Kentucky a virtual island unto its own on this issue.

Following *Minter*, this issue was again addressed in the United States District Court for the Western District of Kentucky by Judge Russell in *MacGlashan v. ABS Lincs KY, Inc.*, 84 F. Supp. 3d 595, 605 (W.D. Ky. 2015). In *MacGlashan*, Judge Russell analyzed the holding of *Sergent v. ICG Knott County, LLC*, 2013 WL 6451210 (E.D. Ky. Dec. 9, 2013), a case which held the heightened standard of proof for emotional distress did apply to statutory claims. Judge Russell disagreed, stating:

> ...[C]ourts have rejected *Sergent* 's interpretation of *Osborne. Minter v. Liberty Mut. Fire Ins. Co.*, 2014 WL 4914739 *5, 2014 U.S. Dist. LEXIS 137741 *12–13 (W.D.Ky.2014); *Smith v. Walle Corp.*, 2014 WL 5780959 *4–5, 2014 U.S. Dist. LEXIS 156859 *9–11 (E.D.Ky.2014) (acknowledging *Osborne* and *Sergent* but expressly rejecting defendant's argument that plaintiff must provide expert testimony to support emotional damages in a discrimination case). **This Court joins the latter group in holding *Osborne*'s requirement for expert testimony is limited to NIED and intentional infliction of emotional distress claims**. As the *Minter* court stated: "The high standard makes sense in those cases, as the elements of such a claim specifically require 'severe or serious emotional injury.' " 2014 WL 4914739 *5, 2014 U.S. Dist. LEXIS 137741 *12.

MacGlashan v. ABS Lincs KY, Inc., 84 F. Supp. 3d 595, 605 (W.D. Ky. 2015)

As Judge Simpson and Judge Russell's learned opinions in *Minter* and *MacGlashan* make clear, Kentucky's long tradition of allowing emotional distress damages without supporting expert testimony in civil actions has not been abrogated by *Osborne*, and any heightened burden of proof for emotional distress damages is limited to "stand-alone" NIED and IIED claims.

B. Kentucky Will Be in the Extreme Minority of States if it Adopts Appellant's Position.

The overwhelming majority of states allow recovery of emotional distress damages in tort actions without requiring supporting expert testimony. Forty four (44) states agree with the Kentucky Court of Appeals and the Campbell Circuit Court that insurance bad faith claims (or breach of contract claims with companion tort claims[20]) may be brought against an insurer without expert evidence to support emotional distress damages.[21] Four (4) states do

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[20] NOTE: Many states do not have a statute similar to Kentucky's Unfair Claims Settlement Practices Act; however, states without similar statutes often allow claims to proceed as breach of contract claims with a companion tort claim, such as "outrage," common law bad faith, or IIED. *See* footnote 21.

[21] Alabama—*Chavers v. Nat'l Sec. Fire & Cas. Co.*, 405 So. 2d 1, 7 (Ala. 1981); *First Commercial Bank v. Spivey*, 694 So. 2d 1316, 1325 (Ala. 1997); Alaska—*Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 457 (Alaska 1985); Arizona—*Farr v. Transamerica Occidental Life Ins. Co. of California*, 699 P.2d 376, 382 (Ariz. App. 1984); Arkansas— *Cincinnati Life Ins. Co. v. Mickles*, 148 S.W.3d 768, 773-74 (Ark. 2004); California—*Jordan v. Allstate Ins. Co.*, 56 Cal. Rptr. 3d 312, 324 (2007); *Crockett v. Miller*, No. D047116, 2006 WL 3441982, at *8 (Cal. Ct. App. Nov. 30, 2006) *citing Capelouto v. Kaiser Found. Hosps.*, 500 P.2d 880, 885 (1972); Colorado— *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 416 (Colo. 2004); *Smith v. Hoyer*, 697 P.2d 761, 765 (Colo. App. 1984), *citing Allabashi v. Lincoln Nat. Sales Corp. of Colorado-Wyoming*, 824 P.2d 1, 4 (Colo. App. 1991); Connecticut—*Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760, 802, 67 A.3d 961, 991 (Conn. 2013); *Oakes v. New England Dairies, Inc.*, 591 A.2d 1261 (Conn. 1991); *Giordano v. Giordano*, 664 A.2d 1136, 1149 (Conn. 1995); Delaware—*Clausen v. Nat'l Grange Mut. Ins. Co.*, 730 A.2d 133, 140 (Del. Super. 1997); *State v. Rodebaugh*, 1993 WL 603334, (Del Super. Mar. 5, 1993); *see also Snowden v. State*, 677 A.2d 33, 38 (Del. 1996); Georgia—*S. Gen. Ins. Co. v. Holt*, 409 S.E.2d 852, 860 (Ga. App. 1991); Hawaii—*Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 432 (Haw. 2011); *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1304-05 (Haw. 1997); Idaho—*Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1234 (Idaho 2010); *Cook v. Skyline Corp.*, 13 P.3d 857, 866 (Idaho 2000); Indiana—*Lumbermens Mut. Cas. Co. v. Combs*, 873 N.E.2d 692, 721 (Ind. Ct. App. 2007); *Stuff v. Simmons*, 838 N.E.2d 1096, 1103 (Ind. Ct. App. 2005); Iowa— *Nassen v. Nat'l States Ins. Co.*, 494 N.W.2d 231, 237 (Iowa 1992); Kansas—*Frickey v. Equity Mut. Ins. Co.*, P.2d 702, 706 (Kan. 1978); *Smith v. Welch*, 967 P.2d 727, 733 (Kan. 1998); Louisiana— *Sher v. Lafayette Ins. Co.*, 988 So. 2d 186, 201-02 (La. 2008); Maine—*Stull v. First Am. Title Ins. Co.*, 745 A.2d 975, 980 (Me. 2000); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 154 (Me. 1979); Maryland—*Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053, 1062 (Md. 1999); *Sterry v. Bethlehem Steel Corp.*, 494 A.2d 748, 753 (1985), *Hoffman v. Stamper*, 843 A.2d 153, 197 (Md. 2004); Massachusetts—*John Hancock Mut. Life Ins. Co. v. Banerji*, 858 N.E.2d 277, 288 (Mass. 2006), *citing Haddad v. Gonzalez*, 576 N.E.2d 658, 661 (Mass. 1991); Michigan—*Runions v. Auto-Owners Ins. Co.*, 495 N.W.2d 166, 168 (Mich. 1992); *Howard v. Canteen Corp.*, 481 N.W.2d 718, 723 (Mich. 1991); Minnesota—*Haagenson v. Nat'l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979); *Patterson v. Wu Family Corp.*, 594

not allow emotional distress damages in insurance claims, either because such claims are limited by statute[22] or because they may only be brought in contract without any companion tort claim.[23] Only one state supreme court—Florida—has ever held an expert is needed in an insurance bad faith case for emotional distress damages, and that was in response to a certified question from a federal court in a case concerning the highly regulated health

N.W.2d 540, 550 (Minn. Ct. App. 1999); Mississippi—*Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1186 (Miss. 1990); *Whitten v. Cox*, 799 So. 2d 1, 11 (Miss. 2000); Missouri—*Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 590 (Mo. Ct. App. 2008); *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854, 877 (Mo. Ct. App. 2009); *citing State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. 2006); Montana—*Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649, 662 (Mont. 2009); Nebraska—*Braesch v. Union Ins. Co.*, 464 N.W.2d 769, 778 (Neb. 1991); *Turek v. Saint Elizabeth Cmty. Health Ctr.*, 488 N.W.2d 567, 569 (Neb. 1992); New Hampshire—*Lister v. Bankers Life & Cas. Co.*, 218 F. Supp. 2d 49, 53 (D.N.H. 2002); citing *Jarvis v. Prudential Ins. Co. of Am.*, 448 A.2d 407, 410 (N.H. 1982); *Franklin Lodge of Elks v. Marcoux*, 825 A.2d 480, 488 (N.H. 2003); New Mexico—*Dickson v. Mountain States Mut. Cas. Co.*, 650 P.2d 1, 3 (N.M. 1982); *Jacobs v. Meister*, 775 P.2d 254, 261 (N.M. 1989); North Carolina—*von Hagel v. Blue Cross & Blue Shield of N. Carolina*, 370 S.E.2d 695, 699 (N.C. 1988); *Williams v. HomEq Servicing Corp.*, 646 S.E.2d 381, 385 (N.C. 2007); North Dakota—*Ingalls v. Paul Revere Life Ins. Grp.*, 561 N.W.2d 273, 283 (1997); *Muchow v. Lindblad*, 435 N.W.2d 918, 924 (N.D. 1989); Ohio—*Carr v. Charter Nat. Life Ins. Co.*, 488 N.E.2d 199, 201 (Ohio 1986); Oklahoma—*Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 916 (Okla. 1982); *Chandler v. Denton*, 741 P.2d 855, 867 (Okla. 1987); Oregon—*Farris v. U. S. Fid. & Guar. Co.*, 587 P.2d 1015, 1018 (Or. 1978); *Peery v. Hanley*, 897 P.2d 1189, 1191 (Or. 1995); Rhode Island—*Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980); *Adams v. Uno Restaurants, Inc.*, 794 A.2d 489, 493 (R.I. 2002); South Carolina—*Univ. Med. Associates of Med. Univ. of S.C. v. UnumProvident Corp.*, 335 F. Supp. 2d 702, 709 (D.S.C. 2004); *Shupe v. Settle*, 445 S.E.2d 651, 655 (S.C. App. 1994); South Dakota—*Stene v. State Farm Mut. Auto. Ins. Co.*, 583 N.W.2d 399, 404 (S.D. 1998) *citing Tibke v. McDougall*, 479 N.W.2d 898, 906 (S.D. 1992); Tennessee—*Holt v. Am. Progressive Life Ins. Co.*, 731 S.W.2d 923, 927 (Tenn. App. 1987); *Est. of Amos v. Vanderbilt U.*, 62 S.W.3d 133, 137 (Tenn. 2001); *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999); Texas—*Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997); *Mora v. Villalobos*, 2005 WL 2000759, at *4 (Tex. App. Aug. 22, 2005); *citing Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995); Utah—*Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801, fn. 3 (Utah 1985); *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 535 (Utah 2002); *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 535 (Utah 2002); Vermont—*Sheltra v. Smith*, 392 A.2d 431, 432 (Vt. 1978); *Larocque v. State Farm Ins. Co.*, 660 A.2d 286, 288 (Vt. 1995); *Human Rights Commn. v. LaBrie, Inc.*, 668 A.2d 659, 668 (Vt. 1995); Virginia—*Harris v. USAA Cas. Ins. Co.*, 37 Va. Cir. 553 (Va. Cir. 1994); *Glover v. Oppleman*, 178 F. Supp. 2d 622, 643 (W.D. Va. 2001); Washington—*Anderson v. State Farm Mut. Ins. Co.*, 2 P.3d 1029, 1035 (Wash. App. 2000); *Miller v. Kenny*, 325 P.3d 278, 293 (Wash. App. 2014); *Christian v. Tohmeh*, 2015 WL 8947244, at *16 (Wash. App. 2015); West Virginia—*Nance v. Kentucky Nat. Ins. Co.*, 240 Fed. Appx. 539, 548 (4th Cir. 2007); *Tanner v. Rite Aid of W. Virginia, Inc.*, 461 S.E.2d 149, 159 (W. Va. 1995); Wisconsin—*Anderson v. Contl. Ins. Co.*, 271 N.W.2d 368, 378 (Wis. 1978); *Hicks v. Nunnery*, 643 N.W.2d 809, 818 (Wis. App. 2002); Wyoming—*State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813, 833 (Wyo. 1994); *Hoblyn v. Johnson*, 55 P.3d 1219, 1231 (Wyo. 2002).

[22] (States that limit insurance bad faith damages by statute) Illinois—*Combs v. Ins. Co. of Illinois*, 497 N.E.2d 503, 508 (Ill. 1986); *citing* 215 Ill. Comp. Stat. Ann. 5/155; Pennsylvania—*Fennell v. Nationwide Mut. Fire Ins. Co.*, 603 A.2d 1064, 1067 (Pa. 1992); *citing* 40 PSA § 1171.1, *et. seq.*

[23] (States that limit insurance bad faith damages to breach of contract only) New Jersey—*Pickett v. Lloyd's*, 621 A.2d 445, 455 (N.J. 1993), *citing Milcarek v. Nationwide Ins. Co.*, 463 A.2d 950, 957 (N.J. App. 1983); New York— *Warhoftig v. Allstate Ins. Co.*, 199 A.D.2d 258, 259 (N.Y. 1993).

insurance industry.[24] Simply put, American jurisprudence has overwhelmingly rejected Appellant's position, as should this Court.

Montana's Supreme Court grappled with these exact issues in *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649 (Mont. 2009) wherein the Court rejected Allstate's argument that a heightened standard of "severe" emotional distress must be met in a bad faith action because a heightened standard was required in early Montana cases involving intentional or negligent infliction of emotional distress. The Court distinguished between emotional distress damages as part of a regular tort action and emotional distress damages in stand-alone intentional or negligent infliction actions, ruling:

> Ultimately, to hold that the standard for parasitic emotional distress damages is "serious or severe" would render meaningless the "heightened" standard we purported to establish in *Sacco* when we recognized the viability of an independent cause of action for emotional distress. **We therefore hold that the "serious or severe" standard announced in *Sacco* applies only to independent claims of negligent or intentional infliction of emotional distress.**

Id. at 664 (internal citations omitted).

What the Montana Supreme Court understood is that there is a distinction between the more recent stand-alone claims of NIED or IIED and a "parasitic" emotional distress damages claim which is a part of a traditional tort action, such as insurance bad faith. *Id.*

In *Nassen v. Natl. States Ins. Co.*, 494 N.W.2d 231 (Iowa 1992), the Iowa Supreme Court likewise recognized emotional distress damages could be awarded in an insurance bad faith action without expert testimony. Upholding a jury award based primarily on the testimony of the plaintiff's friend, who "shepherded her claim through the insurance company," the Iowa Supreme Court held:

> It is, of course, difficult to arrive at a sum of money that fairly compensates for the trauma visited upon elderly persons by having their worldly possessions dissipated by extended care costs that they believe should be covered by insurance. We are convinced, however, that this is a situation

[24] Florida— *Time Ins. Co. v. Burger*, 712 So. 2d 389, 393 (Fla. 1998).

> capable of producing severe mental suffering. We conclude that the evidence was sufficient to support the damages awarded.

Id. at 238.

Additionally, state supreme courts have upheld emotional distress damages in bad faith actions where the jury primarily relied on a party's own testimony to award damages. In *Farmers Home Mut. Ins. Co. v. Fiscus,* 725 P.2d 234, 236 (Nev. 1986), the Nevada Supreme Court upheld a jury award based on the plaintiff's own statements concerning his and his wife's emotional distress resulting from an insurer's bad faith, holding:

> The district court heard unrebutted testimony from Mr. Fiscus that a majority of his family's personal possessions had been destroyed, that his home had been uninhabitable since August 9, 1981, that because of Farmers' actions he lacked the money to repair the home, and that as a result the home had been condemned. He testified that his wife had suffered from a total emotional breakdown shortly after the visit from Farmers' claims adjuster. In reviewing the record, we conclude that the district court could have reasonably concluded that the Fiscuses suffered compensable anxiety, worry, mental and emotional distress from the date of Farmers' February, 1982, denial of the claim until the date of judgment in August of 1985. Compensatory damages were properly awarded against Farmers for this injury.

Farmers Home Mut. Ins. Co. v. Fiscus, 725 P.2d 234, 236 (Nev. 1986).

What the Montana, Iowa, and Nevada Supreme Courts recognize—along with the overwhelming majority of other states' courts[25]—is that emotional distress damages as part of other civil actions can be proven through non-expert evidence, and the heightened burden requiring expert testimony applies only to stand-alone emotional distress claims. *Jacobsen,* 215 P.3d at 662 (Mont. 2009); *see also Est. of Amos,* 62 S.W.3d at 137 (Tenn. 2001). As the Tennessee Supreme Court in *Estate of Amos* observed:

> The subjective nature of "stand-alone" emotional injuries creates a risk for fraudulent claims. The risk of a fraudulent claim is less, however, in a case in which a claim for emotional injury damages is one of multiple claims for damages. **When emotional damages are a "parasitic" consequence of negligent conduct that results in multiple types of damages, there is no**

[25] *See* footnote 21; 44 states allow emotional distress damages in civil actions including insurance bad faith claims without supporting expert testimony.

> **need to impose special pleading or proof requirements that apply to "stand-alone" emotional distress claims.**

Id. (internal citations omitted).

Florida is the only outlier requiring a "qualified health care provider" to offer testimony in support of emotional distress damages in a bad faith claim. *Time Ins. Co., Inc. v. Burger*, 712 So. 2d 389, 393 (Fla. 1998). The *Burger* opinion is easily distinguishable because:

(1) The *Burger* Court's holding was narrowly tailored to apply to health insurance claims. *Id.*;

(2) The *Burger* Court was issuing an opinion in response to a certified question and did not have the entire briefing of a traditional appeal; and

(3) The *Burger* Court was interpreting a specific Florida statute, FSA. §624.155, which the Court held "altered" the common law view barring emotional distress damages absent physical injury. *Id.*

Additionally, the *Burger* opinion merely requires a "qualified healthcare provider" offer supporting evidence but does not require a "expert witness." *Id.* Last, *Burger* was subjected to a scathing dissent by 3 of the 7 Florida Supreme Court justices, with Justice Anstead writing:

> The rationale offered by the majority for this judicial amendment of the statute is that "[i]nsurers have a right and a duty to other policyholders to contest illegitimate claims." One obvious flaw in this reasoning is that an insurer would not be acting in bad faith by contesting illegitimate claims. **It is apparent that the actual basis for the majority's action is a distrust of the jury system, a system that serves as the foundation of both our civil and criminal justice systems.**

Id. at 394.

Moreover, Justice Anstead noted *Burger* reversed decades of Florida law which held "the jury, guided by its judgment and everyday life experiences, is in the best position to make a fair assessment" of emotional distress damages. *Id.*, at fn 2. In sum, the *Burger* decision (1) was premised on common law and statutory law without parallel in Kentucky, (2) was in response to a certified question with different briefing rules, (3) was narrowly

applied to health insurance claims, and (4) was highly dubious when issued even under Florida law. Most important, the *Burger* opinion is the *only one in the country* of its kind and is contrary to the law in forty four (44) other states.

Kentucky has long stood with its sister states in allowing emotional distress damages in civil actions other than NIED without requiring heightened burdens of proof. There is no sound reason under Kentucky law—or any parallel law from other jurisdictions—justifying a departure from the evidentiary standard in insurance bad faith actions seeking relief for emotional distress. Accordingly, this Court ought to uphold the decision of the Campbell Circuit Court and the Kentucky Court of Appeals.

V. CONCLUSION

This Court in *Osborne* addressed the standard of proof required for emotional distress in NIED and IIED tort claims. It does not apply, nor was it meant to apply, the heightened standard of proof requirement in all claims alleging emotional distress, particularly statutory claims such as insurance bad faith. After *Osborne*, a number of courts have addressed this very issue and have determined that—based on Kentucky case law—the heightened proof standard is not applicable. Further, courts from around the nation are in overwhelming agreement that a heightened standard is not required. As a result, the holding of the Kentucky Court of Appeals on this issue should be affirmed.

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